Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
Interconnection and Resale Obligations	)	
Pertaining to	)	CC Docket No. 94-54
Commercial Mobile Radio Services	)	

FIRST REPORT AND ORDER

Adopted: June 12, 1996; Released: July 12, 1996

By the Commission: Comissioner Chong issuing a statement.

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In this Report and Order we adopt a rule concerning the obligations of commercial mobile radio services (CMRS) providers to permit the resale of their services. We initiated this proceeding in a Notice of Proposed Rulemaking and Notice of Inquiry that addressed a broad array of CMRS regulatory issues, including resale.[1] Subsequently, we refined our proposal concerning resale in a second Notice of Proposed Rulemaking.[2]

2. Fifty-one parties filed comments and thirty-four parties filed replies in response to our *Second NPRM*.[3] Based on this record, we conclude that, under current market conditions, restrictions on resale by cellular, broadband personal communications services (PCS), and certain specialized mobile radio (hereinafter "covered SMR") providers[4] will inhibit the development of competition in these services. We therefore prohibit such providers from unreasonably restricting the resale of their services during a transitional period. We are not persuaded, however, that the resale rule should be extended to include CMRS services other than cellular, broadband PCS and covered SMR services, although we will consider on a case-by-case basis complaints alleging that other CMRS carriers' practices concerning interstate resale are unreasonable. Furthermore, we conclude that once broadband PCS licensees have built out their networks and are competing with cellular carriers, market forces will eliminate the need for explicit resale regulation. Therefore, we will sunset the resale rule we adopt

[1] *See* Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, Notice of Proposed Rule Making and Notice of Inquiry, 9 FCC Rcd 5408 (1994) (*Interconnection NOI*).

[2] Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, Second Notice of Proposed Rule Making, 10 FCC Rcd 10666 (1995) (*Second NPRM*). We do not address in this Order other issues raised in the *Second NPRM*, including CMRS-CMRS interconnection, *see* 10 FCC Rcd at 10671-88, roaming, *id.* at 10688-94, interconnection of reseller switches, *id.* at 10712-14, and number transferability, *id.* at 10712. We intend to address these issues in the near future.

[3] A list of the parties filing comments and reply comments is contained in Appendix A. One business day after the expiration of the period for filing reply comments, Watercom filed its reply accompanied by a Request for Acceptance of Late-Filed Comments. Because no party has been prejudiced by Watercom's late filing, we will grant Watercom's request.

[4] *See* para. 19, *infra*.

today, effective five years after the last group of initial licenses for currently allotted broadband PCS spectrum is awarded.

II. BACKGROUND

3. We have defined resale as an activity in which one entity (the reseller) subscribes to the communications services or facilities of a facilities-based provider and then reoffers communications services to the public (with or without "adding value") for profit.[5] Currently, we prohibit cellular licensees from restricting resale of their services, except that a licensee may restrict resale by the other licensee in its service area once the other licensee's five-year buildout period has expired.[6] Our policy of prohibiting restrictions on resale of certain common carrier services was first established in the wireline telecommunications market, where carriers with market power traditionally sought to restrict the resale of their tariffed and cross-elastic services to facilitate price discrimination. Specifically, by forbidding resale of their private line and bulk offerings carriers were able to offer these services at a large discount without incurring the risk that competitors would arbitrage these discounts to captive smaller customers. In two orders issued between 1977 and 1980, we held that provisions in these carriers' tariffs which had the effect of precluding resale were unjust, unreasonable, and unlawfully discriminatory in violation of Sections 201(b) and 202(a) of the Communications Act of 1934 (the "Communications Act" or the "Act").[7] We concluded that unrestricted resale of these services would benefit the public because it would exert pressure on carriers to provide service at cost-based prices, promote efficient utilization of communications capacity and better management of communications networks, and encourage the development and implementation of new technology.[8]

4. In 1981, we established rules to authorize commercial cellular communications and extended the resale policy to cellular service.[9] We established a frequency assignment plan

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[5] *See* Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC2d 261, 263 (1976) (*Resale and Shared Use Decision*), *reconsideration*, 62 FCC2d 588 (1977), *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978).

[6] 47 C.F.R. § 22.901(e).

[7] *Resale and Shared Use Decision*, 60 FCC2d at 280-85, 321; Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 FCC2d 167, 171-74, 193 (1980) (*Resale of Switched Services*), *recon. denied*, 86 FCC2d 820 (1981).

[8] *Resale and Shared Use Decision*, 60 FCC2d at 298-303; *Resale of Switched Services*, 83 FCC2d at 172.

[9] Cellular Communications Systems, 86 FCC 2d 469, 511, 642 (1981) (*Cellular Order*), *modified*, 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982), *appeal dismissed sub nom.* United States v. FCC, No. 82-1526 (D.C. Cir. Mar. 3, 1983).

that allowed for two competing facilities-based cellular systems in each geographic market[10] and reserved one block of spectrum for the exclusive use of the wireline carrier(s) certified to serve the area.[11] Although uncertain as to the ability of a cellular resale market to develop, we found, for the reasons set forth in the *Resale and Shared Use Decision* and *Resale of Switched Services,* that restrictions on cellular resale were contrary to the public interest.[12] Consequently, we decided to grant cellular licenses on the condition that a licensee not restrict the resale of its services, with the intent of promoting a "highly competitive secondary market for distribution of cellular service."[13] This action was also necessary to counteract headstart effects created by the cellular licensing system, under which one of the licenses in a geographic area was often awarded much sooner than the other license in that area.

5. Subsequently, we carved out an exception to our cellular resale policy. In 1992, we found that allowing a cellular carrier to deny resale capacity to a fully operational facilities-based competitor (defined as a carrier whose five-year buildout period has expired) would not violate the standards set forth in Sections 201(b) and 202(a) of the Act.[14] We reasoned that five years was sufficient time for a licensee to build its system, and that permitting licensees to deny each other resale after this period would promote competition by encouraging each licensee to build out its network.[15] By contrast, we found that maintaining the resale requirement until both carriers were fully operational would help to mitigate any competitive disadvantage a second carrier may incur during the "headstart" period created by our grant of a license and construction permit to one carrier (usually the wireline carrier) prior to the other carrier.

6. The *Interconnection NOI* requested comment on whether we should propose rules to impose the resale obligations that apply to cellular licensees on all CMRS providers or any

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[10] *Cellular Order*, 86 FCC 2d at 482.

[11] *Id.* at 483, 490 n.56. The other block was reserved for the use of non-wireline carriers.

[12] *Id.* at 511. Specificaly, we reaffirmed our earlier holding "that resale was an effective deterrent to price discrimination among cross-elastic services and, in any event, these tariff discriminations were unable to meet the 'just and reasonable' standard of the Act." *Id.* at 510.

[13] *Id.* at 511, 642.

[14] *See* Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, CC Docket No. 91-33, Notice of Proposed Rule Making and Order, 6 FCC Rcd 1719, 1720-22 (1991) (*Cellular Resale NPRM and Order*), *aff'd sub nom.* Cellnet Communication, Inc. v. FCC, 965 F.2d 1106 (D.C. Cir. 1992); Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, CC Docket No. 91-33, Report and Order, 7 FCC Rcd 4006, 4008-09 (1992) (*Cellular Resale Order*)

[15] *Cellular Resale Order*, 7 FCC Rcd at 4007-08.

particular class of CMRS providers.[16] In the *Second NPRM*, we tentatively concluded that the existing obligation on cellular providers to permit resale should be extended to other CMRS providers, unless there were a showing that permitting resale would not be technically feasible or economically reasonable for a specific class of providers. In particular, we tentatively concluded that prohibiting CMRS providers from restricting resale or discriminating against resellers would have the overall effect of promoting competition and mitigating head-start advantages among licensees.[17] We sought comment on whether resale is unreasonable, unnecessary, or technically infeasible for any classes of CMRS providers.[18] In addition, we tentatively concluded that a time limitation on the obligation of one facilities-based CMRS provider to permit a competing facilities-based provider to resell its services was appropriate and consistent with the Communications Act.[19]

III. COMMENTS AND DISCUSSION

7. Our consideration of the record persuades us that the existing cellular resale rule should be temporarily extended to providers of broadband PCS and covered SMR providers in order to promote competition in these services. Because cellular, broadband PCS and covered SMR services are not yet provided on a fully competitive basis, we conclude that carriers in these services should, for an interim period, be specifically prohibited from restricting resale or unreasonably discriminating against resellers. Accordingly, we condition existing and future cellular, broadband PCS and covered SMR licenses upon compliance with our resale rule pursuant to our authority under Title III of the Act.[20] Other CMRS providers, by contrast, for the most part offer services for which competition is relatively mature, and there is no evidence in the record of this proceeeding that resale of these services has been unreasonably denied. Therefore, we do not have the same competitive concerns about these services as we do for cellular, broadband PCS and covered SMR services. We therefore conclude that even a temporary resale rule is unnecessary for other CMRS services, and we refrain from imposing such a rule at this time. Common carriers providing these services on an interstate basis, however, remain subject to the general proscriptions of unjust or unreasonable practices and unjust or unreasonable discrimination under Sections 201(b) and 202(a) of the Act. We further note that to the extent we determine that any CMRS providers

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[16] *Interconnection NOI*, 9 FCC Rcd at 5466-67.

[17] *Second NPRM*, 10 FCC Rcd at 10707-09.

[18] *Id.* at 10709.

[19] *Id.* at 10709-12.

[20] 47 U.S.C. §§ 303(r), 309; *see also* WBEN, Inc. v. United States, 396 F.2d 601, 617-19 (2nd Cir.), *cert. denied sub nom.* WBEN, Inc. v. FCC, 393 U.S. 914 (1968); Upjohn Co. v. FDA, 811 F.2d 1583 (D.C. Cir. 1987). Compliance is already a condition of all cellular licenses. *See Cellular Order*, 86 FCC2d at 511.

should be defined in the future as local exchange carriers pursuant to Section 3(26) of the Act, those providers would also be subject to duties with respect to resale under Section 251 of the Act.[21]

A. General Considerations

8. Those commenters that advocate extending the cellular resale rule to other CMRS generally argue that the availability of resale promotes competition, reduces prices, polices price discrimination, encourages innovation and diversity of service offerings, stimulates demand, and mitigates the head start advantages of existing providers.[22] LDDS emphasizes that lowering entry barriers into the CMRS market through unrestricted resale will particularly benefit small businesses.[23] TRA argues that resale is especially valuable in the CMRS market to the extent that full facilities-based competition has not yet arrived and incumbent carriers enjoy competitive advantages over their new rivals.[24] Several commenters further argue that in the absence of a rule, CMRS providers have both the incentive and the ability to prevent entry by resellers. Connecticut Telephone, for example, states that carriers in its service area have established insufficient margins between wholesale and retail prices, making it difficult for resellers to survive.[25] In addition, some commenters argue that as a matter of law restrictions on resale are always unjust and unreasonable in violation of Title II.[26]

9. Opponents of extending the rule against resale restrictions, by contrast, argue that a resale rule is unnecessary for CMRS because the market is highly competitive. They assert

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[21] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Notice of Proposed Rulemaking, FCC 96-182 (released Apr. 19, 1996). Section 251(b)(1) of the Act imposes on each local exchange carrier "[t]he duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services." Additional resale obligations are imposed on incumbent local exchange carriers pursuant to Section 251(c)(4) of the Act.

[22] *See* Bell Atlantic Comments at 9-10; Comcast Comments at 26; Connecticut Telephone Comments at 1, 3; GSA Comments at 6; ITAA Comments at 3-4; LDDS Comments at 1-6; NYNEX Comments at 3; Pacific Comments at 9; PCIA Comments at 9; RCC Comments at 6; SBMS Comments at 18; Sprint Venture Comments at 9; Time Warner Comments at 1-2; Vanguard Comments at 10; Cable & Wireless Reply Comments at 4-5; MCI Reply Comments at 4-6.

[23] LDDS Comments at 2, 5-6.

[24] TRA Comments at 24-28.

[25] Connecticut Telephone Comments at 2; *see also* GSA Comments at 6-7; ITAA Comments at 6; LDDS Comments at 7-8; TRA Comments at 15-17; Allnet Reply Comments at 1; Cable & Wireless Reply Comments at 5-6.

[26] *See* ITAA Comments at 4; LDDS Comments at 2, 6-7; Cable & Wireless Reply Comments at 4-5.

that unlike the cellular market several years ago, there are no bottlenecks or significant headstarts; thus, resale is not needed to secure the benefits of competition.[27] AMTA argues that in a competitive marketplace carriers will allow resale where it makes economic sense to do so.[28] Furthermore, according to commenters, a resale rule could harm the market's development by discouraging buildout and innovations.[29] Nextel, in particular, asserts that the option of resale has already discouraged companies such as Time Warner and MCI from entering the market as facilities-based providers, and that unrestricted resale will reduce the value of spectrum at future auctions.[30] Some commenters also claim that carriers could be left with stranded capacity if they are required to construct new facilities to serve a reseller and the reseller subsequently decides to leave the system.[31] These commenters argue that restrictions on resale do not always violate Sections 201 and 202, and that the question whether such restrictions are unjust, unreasonable, or unreasonably discriminatory as applied to any service requires us to weigh the costs and benefits under all the relevant circumstances.[32]

10. We conclude that both groups of commenters make valid points. We continue to believe that prohibiting restrictions on resale confers important public benefits in markets that are less than fully competitive. First, the economic literature on resale price maintenance illustrates that prohibiting resale restrictions may reduce the likelihood of systematic price discrimination and cartel behavior.[33] Second, in the wireline context the resale rule has been

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[27] *See* AMTA Comments at 7-9; E.F. Johnson Comments at 3; Geotek Comments at 4-7; Nextel Comments at 8-10; Western Comments at 4-5; E.F. Johnson Reply Comments at 2-3; Geotek Reply Comments at 3-4; Pacific Reply Comments at 11; *see also* BellSouth Reply Comments at 7.

[28] AMTA Comments at 9; *see also* E.F. Johnson Comments at 2-3; PCIA Comments at 21; AMTA Reply Comments at 2-6.

[29] *See* E.F. Johnson Comments at 2; Geotek Comments at 4, 7-9; Nextel Comments at 10-12; Southern Comments at 6; Western Comments at 5.

[30] Nextel Comments at 11-12.

[31] GTE Comments at 17-18; NTCA Comments at 5; PageNet Comments at 12-15; *see also* SNET Comments at 13.

[32] *See, e.g.,* AirTouch Comments at 18-19; AMTA Comments at 8 n.7; MobileMedia Comments at 4; PageNet Comments at 15-18; BellSouth Reply Comments at 5-6; Nextel Reply Comments at 5-6.

[33] *See generally* M. Katz, "Vertical Contractual Relations," in THE HANDBOOK OF INDUSTRIAL ORGANIZATION, ed. R. Schmalensee & R. Willig (1990) (THE HANDBOOK OF INDUSTRIAL ORGANIZATION); S. Ornstein & D. Hanssens, *Resale Price Maintenance: Output Increasing or Restricting? The Case of Distilled Spirits in the United States*, 36 J. INDUS. ECON. 1-18 (1987); P. Ippolito, *Resale Price Maintenance: Empirical Evidence From Litigation*, 34 J. LAW AND ECON. 263-94 (1991); T. Gilligan, *The Competitive Effects of Resale Price Maintenance*, 17 RAND J. OF ECON. 544-56 (1986).

found to promote the public interest by: (1) encouraging competitive pricing; (2) discouraging unjust, unreasonable, and unreasonably discriminatory carrier practices; (3) reducing the need for detailed regulatory intervention and the administrative expenditures and potential for market distortions that may accompany such intervention; (4) promoting innovation and the efficient deployment and use of telecommunications facilities; (5) improving carrier management and marketing; (6) generating increased research and development; and (7) positively affecting the growth of the market for telecommunications services.[34] Third, we have recognized the public interest benefits of resale in the wireless context, and have facilitated them by explicitly conditioning cellular licenses on adherence to our resale policy.[35] In particular, we have recognized that resale of wireless services can speed the development of competition by permitting new entrants to begin offering service to the public before they have built out their facilities.

11. The common theme underlying the benefits to be obtained from a resale rule is that they are most prominent in markets that have not achieved full competition. On the one hand, an active resale market helps to replicate many of the features of competition, including promotion of competitive pricing and discouraging unreasonably discriminatory practices. At the same time, resale hastens the arrival of competition by speeding the development of new competitors.

12. We further conclude that an appropriately targeted resale rule can achieve these benefits at relatively limited cost. In this regard, it is important to clarify what the resale rule we adopt in this Order does and does not entail. Specifically, the rule does not require providers to structure their operations or offerings in any particular way, such as to promote resale, or adopt wholesale/retail business structures, or establish a margin for resellers, or guarantee resellers a profit.[36] Rather, the rule has two relatively straightforward aspects. First, no provider may offer like communications services to resellers at less favorable prices, terms, or conditions than are available to other similarly situated customers, absent reasonable justification.[37] Second, no provider may directly or indirectly restrict resale in a manner that is unreasonable in light of the policies stated here. Under this aspect of the rule, an explicit

[34] *See Resale and Shared Use Decision*, 60 FCC2d at 298-303; *Resale of Switched Services*, 83 FCC2d at 172. This analysis has been judicially determined to be reasonable. *See* American Tel. & Tel. Co. v. FCC, 572 F.2d 17, 23 (2d Cir. 1978).

[35] *See Cellular Order*, 86 FCC2d at 510-11; *Cellular Resale NPRM and Order*, 6 FCC Rcd at 1724.

[36] *See Cellular Resale NPRM and Order*, 6 FCC Rcd at 1726.

[37] *See id.* at 1725-26.

ban on resale is unlawful, as are practices that effectively (*i.e.*, indirectly) restrict resale, unless they are justified as reasonable.[38]

13. The rule also does not put providers at significant risk of loss from stranded investment. Nothing about the resale rule precludes a provider from engaging in the commonplace business practice of ensuring that the terms and conditions of its offerings provide adequate compensation for its services over the term during which those services will be provided, including normal provisions to insure against the risk of loss arising from termination. Thus, "stranded investment" is not a persuasive argument against retaining or broadening the scope of the resale rule.

14. Nonetheless, we do not believe that a resale rule is appropriate for all markets at all times. Neither the language of the Communications Act nor relevant precedent establishes that any restriction on resale or discrimination against resellers necessarily violates Section 201 or 202. In the *Resale and Shared Use Decision* and *Resale of Switched Services*, we determined that wireline carriers' restrictions on resale and discrimination against resellers were generally unjust and unreasonable because the public and private benefits to be obtained from unrestricted resale in that market at that time outweighed any harm that a resale rule would cause.[39] It is consistent with these decisions to hold that, under different conditions, the costs of a resale rule might outweigh the benefits, and that resale restrictions in a particular market would not necessarily be unjust and unreasonable in violation of the Act or the public interest.[40] In particular, as markets become more competitive, the benefits to be attained through a resale rule generally diminish because carriers have less opportunity and incentive anticompetitively to restrict resale. At the same time, the resale rule, like all regulation, necessarily implicates costs, including administrative costs, which should not be imposed unless clearly warranted.[41] We therefore conclude that our resale rule should be narrowly tailored to apply only to those services where, due to competitive conditions, its application will confer important benefits, and only for so long as competitive conditions continue to render application of the resale rule necessary.

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[38] *See, e.g.*, Petitions for Waiver of Various Sections of Part 69 of the Commission's Rules, Order on Reconsideration, 2 FCC Rcd 28, 34 (1987). *See also* MCI Telecommunications Corp., 81 FCC2d 568 (1980) (MCI's limitation of number of authorization codes available to any customer was lawful even though it indirectly burdened resale because it was a reasonable response to a legitimate business problem).

[39] *See Resale and Shared Use Decision*, 60 FCC2d at 283; *Resale of Switched Services*, 83 FCC2d at 171-74.

[40] *See Cellular Resale Order*, 7 FCC Rcd at 4008-09 (balancing costs and benefits to permit restrictions on resale by fully operational facilities-based cellular competitors).

[41] *See generally* P. Joskow & N. Rose, "The Effects of Economic Regulation," in THE HANDBOOK OF INDUSTRIAL ORGANIZATION.

B. Application to Specific Services

15. We seek to apply the resale rule only to those services in which the benefits of a rule requiring unrestricted resale exceed the costs. Several commenters argue that exemption of any class of providers would violate the goal of regulatory parity embodied in Section 332 of the Communications Act.[42] We conclude, however, that considerations of parity do not require identical regulation of services that are differently situated.[43] Indeed, in determining whether carriers in different services should be subject to similar regulations, we have consistently examined whether they were similarly situated with respect to, among other factors, the markets they serve.[44]

16. We therefore consider the costs and benefits of the resale rule as applied to particular services. Most commenters do not question the continued application of the resale rule to the duopoly cellular service. In particular, these commenters argue that new entrants, such as broadband PCS providers, need the opportunity to resell cellular services in order to enter the market quickly as viable competitors.[45] Similarly, most commenters agree that extending the resale rule to broadband PCS providers, which are already competing directly with cellular carriers for the mass consumer two-way voice market where they have begun service and are expected in the near future to do so nationwide as their primary business, will advance regulatory parity and further promote the procompetitive ends that the resale rule is designed to achieve.[46] Several commenters argue that similar considerations require extension of the resale rule to some or all SMR providers.[47] Some commenters, however, argue that regulating the resale policies of non-cellular CMRS providers is unnecessary to promote

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[42] *See, e.g.*, Ameritech Comments at 6; CTIA Comments at 22-24; New Par Comments at 22; SNET Comments at 13-14; Bell Atlantic NYNEX Reply Comments at 9.

[43] *See, e.g.*, BellSouth Comments at 7; AirTouch Reply Comments at 8; E.F. Johnson Reply Comments at 4; Nextel Reply Comments at 3-5; Pacific Reply Comments at 9; PCIA Reply Comments at 10; Southern Reply Comments at 7. Although Section 332 of the Act was designed to eliminate unwarranted regulatory disparities among different classes of CMRS, Congress recognized "that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services," and it therefore permitted us "some degree of flexibility to determine which specific regulations should be applied to each carrier." H.R. Rep. No. 103-213, 103rd Cong., 1st Sess. 491.

[44] *See, e.g.*, Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1467-72 (1994) (*CMRS Second Report and Order*).

[45] *See, e.g.*, Cellnet of Ohio Comments at 5; LDDS Comments at 4; Pacific Comments at 9.

[46] *See, e.g.*, AirTouch Comments at 15; NYNEX Comments at 8; BellSouth Reply Comments at 2-3.

[47] *See* BellSouth Comments at 7; CTIA Comments at 22-24; ITAA Comments at 5-6; BellSouth Reply Comments at 2-3; CTIA Reply Comments at 7-8.

competition, and a few contend that the CMRS market as a whole has become sufficiently competitive to render the rule unnecessary even as applied to cellular.[48]

17. We conclude that, at present, the resale rule remains necessary as applied to cellular, broadband PCS and covered SMR providers. Although CMRS as a whole is becoming a competitive industry,[49] it is in transition with the continuing introduction of PCS and transformation of SMR, and some aspects of it are not yet substantially competitive. In particular, each geographic market has only two licensed cellular carriers, and in most markets these carriers do not yet face competition from any other facilities-based provider capable of offering reasonably substitutable services to a substantial majority of cellular customers. Thus, we have recently observed that the market for cellular services "is not the model of perfect competition."[50] Until this situation changes, we remain concerned that cellular carriers have market power sufficient to enable them to impose unreasonable restrictions upon resale, and thus to stifle the competition that resellers can provide. Furthermore, as new entrants, such as broadband PCS providers, begin to seek customers, they will be competing directly with cellular firms that in many instances have been in the market for a decade or more. The advantages such incumbency conveys are well understood.[51]

18. We also conclude that broadband PCS and covered SMR providers should be governed by the same resale obligations as cellular carriers. More than any other wireless service, we expect broadband PCS providers to target their services, at least initially, toward the same customers who are currently served and sought after by cellular providers.[52] Therefore, while we recognize that the market power of broadband PCS providers is not parallel with that of cellular carriers, we conclude that requiring broadband PCS providers to permit unrestricted resale will promote regulatory symmetry and will further the same procompetitive ends as applying the same rule to cellular providers, including policing price discrimination and encouraging competitive pricing. Furthermore, we note that in any

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[48] *See* Nextel Comments at 9 n.13; Western Comments at 4-5; Geotek Reply Comments at 3-4.

[49] *See generally* Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Third Report and Order, 9 FCC Rcd 7988, 8001-36 (1994); Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, 10 FCC Rcd 8844 (1995) (*Competition Report*).

[50] *Competition Report*, 10 FCC Rcd at 8866.

[51] *See generally* R. Gilbert, "Mobility Barriers and the Value of Incumbency," in THE HANDBOOK OF INDUSTRIAL ORGANIZATION; J. Tirole, THE THEORY OF INDUSTRIAL ORGANIZATION, 277-303 (1992).

[52] *See Competition Report*, 10 FCC Rcd at 8859; Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Notice of Proposed Rule Making and Tentative Decision, 7 FCC Rcd 5676, 5701-07 (1992).

geographic market, the earliest licensed broadband PCS providers will have a headstart advantage over their last licensed competitors of up to two years.[53] Much as previously occurred in the cellular market, we believe that the ability to resell their competitors' services will help lower this hurdle for the later PCS entrants and give them the opportunity quickly to become viable competitors.[54]

19. In addition, we conclude that certain SMR providers should be governed by our resale policy because such providers have significant potential to compete directly with cellular and broadband PCS providers in the near term. These "covered SMR providers" include two classes of SMR licensees. First, the resale rule will extend to 800 MHz and 900 MHz SMR licensees that hold geographic area licenses.[55] Second, the rule will cover incumbent wide area SMR licensees, defined as licensees who have obtained extended implementation authorizations in the 800 MHz or 900 MHz SMR service, either by waiver or under Section 90.629 of our rules. Within each of these classes, "covered SMR providers" includes only licensees that offer real-time, two-way switched voice service that is interconnected with the public switched network, either on a stand-alone basis or packaged with other telecommunications services. Because they do not compete substantially with cellular and broadband PCS providers, local SMR licensees offering mainly dispatch services to specialized customers in a non-cellular system configuration, as well as licensees offering only data, one-way, or stored voice services on an interconnected basis, are not covered by the resale rule we adopt today.[56] The costs of applying the resale policy to their operations would outweigh the benefits. Not the least of these costs is that applying the policy might give them an incentive to eliminate their interconnection, which would not be in the public interest. Of course, any SMR provider that is not interconnected to the public switched network does not offer CMRS, and therefore is not subject to the resale rule.[57]

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[53] The earliest broadband PCS licenses were awarded to three holders of pioneer's preferences on December 13, 1994. The remaining A and B block licenses were awarded on June 23, 1995, and the C block auction was completed on May 6, 1996. We plan to begin the auction of D, E, and F block licenses later this year.

[54] *See Cellular Resale Order*, 7 FCC Rcd at 4007-08.

[55] The Commission is now in the process of issuing geographic area licenses in the 900 MHz service based on the results of the 900 MHz auction completed in April 1996. Auctioning of geographic area licenses in the 800 MHz SMR band will commence following the conclusion of our rulemaking in PR Docket No. 930144.

[56] Several commenters recognize that different resale rules may be appropriate for different SMR providers, depending on the nature of their services. *See* PCIA Comments at 16 n.36; BellSouth Reply Comments at 2; E.F. Johnson Reply Comments at 3 n.4.

[57] *See CMRS Second Report and Order*, 9 FCC Rcd at 1450-51.

20. Some commenters argue that PCS providers need time to work out bugs in their systems and implement handset certification before they can permit unrestricted resale.[58] Similarly, some commenters argue that the resale rule should not apply to SMR providers because of technical considerations, or due to the danger of fraud.[59] We are not persuaded, however, that technical considerations require any delay in applying the resale rule to these carriers. Commenters' arguments appear to rest in part on a theory that, if providers are required to respond to any and all requests for bulk capacity, then they will lose control of their networks in a managerial sense (*e.g.*, control over network growth). That argument is flawed because the resale rule does not require providers to respond to any and all requests for bulk capacity *per se*. The rule requires only that a bulk discount (or any offering) made available to one customer must be made available to similarly situated customers on a non-discriminatory basis. Commenters have not sufficiently explained how their engineering control over their networks will be diminished if their services are purchased by parties that intend to resell the services rather than directly by end users. In addition, we are not persuaded by commenters' speculation that SMR carriers' exposure to fraud would be increased by unrestricted resale or that operators would not have means available consistent with the resale rule to limit such exposure.

21. With respect to other CMRS, by contrast, commenters make persuasive arguments that competitive conditions render a resale rule an unnecessary burden.[60] At present, cellular, broadband PCS and covered SMR providers are the only CMRS carriers principally competing against each other for customers in the mass market for two-way switched voice and data services. In contrast, most other CMRS providers, at least for the immediate future, will not be positioned to compete successfully for these customers. Furthermore, with regard to these other CMRS providers, the record suggests that resale is an established practice, competition appears to be vigorous, and there is no evidence that such providers are unreasonably restricting resale.[61] We conclude that differences in the market conditions faced

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[58] APC Comments at 9-11; PCIA Comments at 20-21; Pacific Reply Comments at 9-12; U.S. Airwaves Reply Comments at 12.

[59] *See, e.g.*, AMTA Comments at 10-13; Nextel Comments at 13-15; PCIA Comments at 15-19.

[60] *See, e.g.*, AirTouch Comments at 17-18; BellSouth Comments at 7; GTE Comments at 21-22; PageNet Comments at 2-11; PCIA Comments at 10-13; WJG Maritel Comments at 6-8; AirTouch Reply Comments at 7-9; BellSouth Reply Comments at 8; PageNet Reply Comments at 2-8; Watercom Reply Comments at 2-4; Letter from Robert L. Pettit, counsel for PCIA, to William F. Caton, Acting Secretary, FCC, dated Jan. 22, 1996, Attachment at 2-3 (PCIA *Ex Parte*).

[61] *See* AMTA Comments at 12 n.10; MobileMedia Comments at 3-4; PCIA Comments at 12-13; PageNet Reply Comments at 7-8; PCIA *Ex Parte*, Attachment at 2; Letter from Alan A. Shark, President and CEO, AMTA, to Rosalind K. Allen, Deputy Chief, Wireless Telecommunications Bureau, dated May 16, 1996, at 5. *See also Competition Report*, 10 FCC Rcd at 8867-68; *CMRS Second Report and Order*, 9 FCC Rcd at 1467-70.

by classes of CMRS other than cellular, broadband PCS and covered SMR providers warrant a decision not to apply the resale rule to these other carriers.[62]

22. Finally, we do not by this Order relieve CMRS providers of any portion of their statutory obligation under Sections 201(b) and 202(a) of the Act, nor do we determine that any resale practice is just and reasonable *per se*. Therefore, to the extent that a CMRS provider offers interstate service, an unjust or unreasonable resale practice or unjust or unreasonable discrimination against resellers may be the subject of a complaint alleging a statutory violation under Section 208 of the Act. In deciding such a complaint, we would consider whether the activity complained of is unjust and unreasonable based on all the circumstances of the case, including the market conditions affecting that particular carrier. Of course, to the extent a cellular, broadband PCS, or covered SMR provider violates our rule adopted here, a Section 208 complaint concerning such rule violation may be filed regardless of whether the service is interstate or intrastate.[63]

C. Sunset

23. Geotek argues that if we decide that unrestricted resale of cellular service is necessary to help PCS licensees overcome the headstart enjoyed by their cellular competitors, the rule should continue to apply only for a five-year period. At the end of that time, Geotek states, PCS providers should no longer need to rely on resale and all resale obligations for CMRS providers should be eliminated.[64] For similar reasons, Bell Atlantic suggests that we reexamine the costs and benefits of the resale rule after we finish awarding PCS licenses.[65]

24. We agree with Geotek and Bell Atlantic that the competitive development of broadband PCS service will obviate the need for a resale rule in the cellular and broadband PCS market sector. Our rules require broadband PCS licensees to significantly build out their networks within five years of being licensed.[66] Thus, within five years after the D, E, and F block broadband PCS licenses are awarded, it is reasonable to anticipate that there will be up to six facilities-based broadband PCS carriers, as well as potentially one or more covered SMR providers, competing with two cellular licensees in every geographic area. We therefore provide that application of the resale rule to cellular, broadband PCS and covered SMR

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[62] Because of this conclusion, we need not address arguments that resale of these services is technically infeasible or would cause other harms. *See, e.g.*, GTE Comments at 18-21; In-Flight Comments at 5-8.

[63] *See* Continental Mobile Telephone Co. v. Chicago SMSA Limited Partnership, 9 FCC Rcd 1583 (1994).

[64] Geotek Reply Comments at 4.

[65] Bell Atlantic Comments at 11-12.

[66] 47 C.F.R. § 24.203.

providers will terminate five years after we award the last group of initial licenses for currently allocated broadband PCS spectrum. The commencement of the five-year sunset period will be announced by Public Notice.

D. Resale by Facilities-Based Competitors

25. The current resale rule for cellular carriers permits a licensed provider to restrict or prohibit resale by the other licensed provider in the same geographic area beginning five years after the second carrier is authorized to begin construction.[67] Many commenters contend that we should allow all CMRS providers to impose similar restrictions on resale by their facilities-based competitors after some initial period. These commenters generally argue that our rules should balance the interest in "jump-starting" competition in CMRS against the danger of creating an incentive for licensees to "free ride" on their competitors' investments rather than rapidly building out their networks.[68] Most of these commenters favor permitting restrictions on resale by a facilities-based competitor beginning five years after the competitor obtains its license,[69] but some advocate a shorter period[70] and a few argue that the window should be ten years.[71]

26. Some commenters contend that CMRS carriers should never be required to permit resale by their facilities-based competitors, even for a limited time. These commenters argue that a rule requiring unrestricted facilities-based resale would confer few public benefits because the market will lead carriers to allow resale by their facilities-based competitors where resale makes economic sense.[72] At the same time, these parties argue, the potential costs of unrestricted resale by facilities-based providers are great. In particular, commenters warn, the availability of resale may discourage licensees from building out their networks,[73]

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[67] 47 C.F.R. § 22.901(e).

[68] *See, e.g.*, Alltel Comments at 3-4; AT&T Comments at 27-28; BellSouth Comments at 8-10; Comcast Comments at 26-27; GTE Comments at 22-23; NYNEX Comments at 8; PCS Primeco Comments at 10; RCA Comments at 11-13; RCC Comments at 7; *see also* Pacific Comments at 9.

[69] *See, e.g.*, Alltel Comments at 3; CTIA Comments at 25; GTE Comments at 22-23; RCA Comments at 11-12; Vanguard Comments at 11-12; U.S. Airwaves Reply Comments at 13.

[70] *See, e.g.*, AT&T Comments at 28 (18 months); BellSouth Comments at 8-9 (no more than three years); New Par Comments at 22-23 (one year); SNET Comments at 17 (18 months).

[71] *See* Pacific Comments at 9-10; Sprint Venture Comments at 10.

[72] *See* AirTouch Comments at 16; *see also* Pacific Comments at 8.

[73] *See* SBMS Comments at 19.

PCS licensees may build their networks to resemble cellular networks rather than innovating,[74] and established carriers may abuse their resale rights by deliberately absorbing the capacity of their small competitors and denying those competitors the opportunity to earn a reasonable return.[75] On the other hand, a few commenters argue that facilities-based providers should be permitted to resell CMRS without restrictions indefinitely.[76]

27. We conclude that unrestricted resale by facilities-based competitors during the transitional period will serve the public interest by speeding the transition to a fully competitive market sector. Given the imperfectly competitive, duopoly cellular market that exists today, we do not believe that market forces alone provide sufficient incentive for carriers to allow their facilities-based competitors to resell service where economically efficient. Furthermore, as discussed above, one reason for requiring cellular, broadband PCS, and covered SMR carriers to comply with the resale rule for an interim period is to help new entrants overcome the advantages enjoyed by the established incumbents with which they will be competing. An exception to the resale rule for facilities-based competitors would defeat this goal.

28. We are unconvinced by arguments that unrestricted resale by facilities-based competitors would create unacceptable costs. As discussed previously, it is reasonable to assume that CMRS providers will price their services to earn a return on their investment and will incorporate appropriate language into their agreements to guard against an unexpected discontinuation of services. Such contracting practices should protect carriers against their competitors' making short-term demands that would leave them with stranded capacity, whether deliberately or otherwise. Furthermore, the continued growth in CMRS demand makes it likely that any temporary excess capacity would quickly be utilized.[77] In addition, our decision to sunset the resale rule, combined with the existence of our buildout requirements, will limit any incentive for licensees to rely on resale rather than constructing facilities, even assuming that carriers that have invested substantial sums in obtaining licenses would have such incentive. For these reasons, we conclude that the costs of not excepting facilities-based competitors from the resale rule are small, and indeed are outweighed by the administrative costs of implementing an exception.

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[74] *See* Nextel Comments at 10.

[75] *See* MobileMedia Comments at 7; *see also* Vanguard Comments at 10-11.

[76] *See* GSA Comments at 8; ITAA Comments at 6-7; Cable & Wireless Reply Comments at 8-9.

[77] *See, e.g., Competition Report*, 10 FCC Rcd at 8846, 8874. The growth rate of cellular subscribers in 1994 exceeded 50 percent. Sakelaris, *Cellular Industry on Threshold of Entering New Era of Services*, RADIO COMM. REPORT, July 24, 1995, at 22.

29. We also are unpersuaded by those commenters that favor cutting off the resale rule for facilities-based competitors after less than five years. Our rules allow broadband PCS licensees five years to meet their first buildout threshold. Because of the headstart disadvantages that these providers will face, it is reasonable to forbid restrictions on their use of resale to establish themselves throughout the initial buildout period, especially in light of the relatively small cost exacted by the resale rule. It is also reasonable to allow covered SMR providers a similar period to establish themselves through resale. Given our decision to sunset the resale rule in its entirety five years after the last currently allotted broadband PCS spectrum license is awarded, we need not consider separately arguments for extending the rule as applied to facilities-based competitors for longer than five years.

30. Consistent with our decision not to permit cellular, broadband PCS, and covered SMR providers to restrict resale by their facilities-based competitors during the transitional period, we also eliminate the provision in our existing rule that permits cellular licensees to impose such restrictions on their fully operational cellular competitors. A primary reason we adopted this exception for cellular licensees was our concern that a licensee in the duopoly cellular market would serve much of its licensed area by using its competitor's facilities rather than building out its own network.[78] This was especially a concern because most cellular licenses were awarded by lottery (*i.e.*, at far less than their economic value), and because in the absence of a general sunset a licensee could theoretically continue to rely on resale indefinitely even though the public interest would favor build-out of competitive facilities. Today, however, most cellular licensees have already built out their networks. We therefore conclude that the exception is no longer necessary to serve its intended purpose, and that its elimination will promote procompetitive goals, as well as maintain regulatory parity among competing providers, by giving cellular licensees the same opportunities to resell as their competitors during the transitional period.

E. Other Issues

31. Finally, we address two comments regarding application of the resale rule to particular circumstances. First, AT&T claims that any resale obligation we impose should apply only to services that are regulated under Title II; thus, a provider should not be obligated to offer a reseller the same package of bundled service and customer premises equipment that it offers to other large customers.[79] We are concerned, however, that excluding from the resale rule all bundled packages that include non-Title II components would potentially offer carriers an easy means to circumvent the rule. Although we do not preclude the possibility that a restriction on resale of a bundled package could be shown just

[78] *See Cellular Resale NPRM and Order*, 6 FCC Rcd at 1721-22; *Cellular Resale Order*, 7 FCC Rcd at 4008.

[79] AT&T Comments at 26 n 56.

and reasonable under some circumstances, we do not as a general matter limit application of the resale rule as AT&T requests.

32. Second, GTE proposes that providers should be permitted to restrict resale of services that include proprietary equipment or technology. GTE argues that this exception is necessary in order to preserve CMRS licensees' incentive to develop and offer innovative services.[80] We are not persuaded by GTE's argument. As discussed above, the resale rule does not prevent a provider from recovering its costs incurred in providing a service, including the costs of developing any underlying technology, or from inserting in its sales agreements appropriate, non-discriminatory terms to protect its interests. As a general matter, therefore, we are not convinced that the resale rule undermines providers' incentive to innovate. Although it is conceivable that concerns regarding proprietary information or technology might under some circumstances constitute reasonable justification for restricting resale, the present record is insufficient to establish what those conditions might be with enough precision to permit formulation of a general rule.

IV. CONCLUSION

33. We conclude that, under current market conditions, unrestricted resale of cellular, broadband PCS and covered SMR services will promote the public interest by hastening the arrival of full competition. We therefore transitionally prohibit cellular, broadband PCS and covered SMR carriers from restricting the resale of their services or discriminating against resellers. In light of anticipated competitive developments in this market, we will sunset this resale rule five years after the last group of licenses for currently allocated broadband PCS spectrum is awarded.

V. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

34. As required by Section 604 of the Regulatory Flexibility Act, 5 U.S.C. § 604 (1981), the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the impact of the policies and rules adopted in this Order on small entities. The FRFA is contained in Appendix B to this Order.

[80] *See* GTE Reply Comments at 15-16; Letter from Andre J. Lachance, attorney for GTE, to Barbara Esbin, Commercial Wireless Division, dated Dec. 7, 1995, at 4-6.

B. Authority

35. This action is taken pursuant to Sections 1, 4(i), 4(j), 201, 202, 303(r), 309, 332, and 403 of the Communications Act, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 202, 303(r), 309, 332, 403.

C. Further Information

36. For further information regarding this Order, contact Jeffrey Steinberg of the Wireless Telecommunications Bureau Policy Division, at 202-418-1310.

VI. ORDERING CLAUSES

37. Accordingly, IT IS ORDERED that the rule amendments appearing at Appendix C and discussed herein ARE ADOPTED and SHALL BE EFFECTIVE sixty days following publication in the Federal Register.

38. IT IS FURTHER ORDERED that the Request for Acceptance of Late-Filed Comments filed by Waterway Communication System, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Parties Filing Comments

1. AirTouch Communications, Inc. (AirTouch)
2. All Cellular, Inc.
3. Alltel Mobile Communications, Inc. (Alltel)
4. American Mobile Telecommunications Association, Inc. (AMTA)
5. American Personal Communications (APC)
6. American Tel Group
7. Ameritech
8. AT&T Corporation (AT&T)
9. Bell Atlantic Mobile Systems, Inc. (Bell Atlantic)
10. BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corp. (BellSouth)
11. Cellnet Communications, Inc.
12. Cellnet of Ohio, Inc. (Cellnet of Ohio)
13. Cellular Service, Inc. and ComTech Mobile Telephone Company (CSI/ComTech)
14. Cellular Telecommunications Industry Association (CTIA)
15. Comcast Cellular Communications, Inc. (Comcast)
16. Connecticut Telephone and Communication Systems, Inc. (Connecticut Telephone)
17. E.F. Johnson Company (E.F Johnson)
18. Frontier Cellular Holding Inc. (Frontier)
19. General Communication, Inc. (GCI)
20. General Services Administration (GSA)
21. Geotek Communications, Inc. (Geotek)
22. GTE Service Corporation (GTE)
23. Horizon Cellular Telephone Company (Horizon)
24. In-Flight Phone Corporation (In-Flight)
25. Information Technology Association of America (ITAA)
26. WorldCom, Inc. d/b/a LDDS WorldCom (LDDS)
27. MCI Telecommunications Corporation (MCI)
28. MobileMedia Communications, Inc. (MobileMedia)
29. MobileOne
30. Molasky, Andrew M.
31. National Telephone Cooperative Association (NTCA)
32. National Wireless Resellers Association (NWRA)
33. New Par
34. New York Telephone Company, New England Telephone & Telegraph Company, and NYNEX Mobile Communications Company (NYNEX)
35. Nextel Communications, Inc. (Nextel)
36. Pacific Telesis Mobile Services and Pacific Bell Mobile Services (Pacific)

37. Paging Network, Inc. (PageNet)
38. PCS Primeco, L.P. (PCS Primeco)
39. Personal Communications Industry Association (PCIA)
40. Rural Cellular Association (RCA)
41. Rural Cellular Coalition (RCC)
42. San Diego Cellular Communications, Inc.
43. SNET Cellular, Inc. (SNET)
44. The Southern Company (Southern)
45. Southwestern Bell Mobile Systems, Inc. (SBMS)
46. Sprint Telecommunications Venture (Sprint Venture)
47. Telecommunications Resellers Association (TRA)
48. Time Warner Telecommunications (Time Warner)
49. Vanguard Cellular Systems, Inc. (Vanguard)
50. Western Wireless Corporation (Western)
51. WJG Maritel Corporation (WJG Maritel)

Parties Filing Reply Comments

1. AirTouch
2. Allnet Communication Services, Inc. (Allnet)
3. AMTA
4. Ameritech
5. AT&T
6. Bell Atlantic NYNEX Mobile, Inc. (Bell Atlantic NYNEX)
7. BellSouth
8. Cable & Wireless, Inc. (Cable & Wireless)
9. People of the State of California and the Public Utilities Commission of California (California)
10. CSI/ComTech
11. CTIA
12. Connecticut Telephone
13. E.F. Johnson
14. GSA
15. Geotek
16. GTE
17. In-Flight
18. MCI
19. National Association of Regulatory Utility Commissioners (NARUC)
20. NWRA
21. New Par
22. Nextel
23. Pacific Bell Mobile Services (Pacific)

24. PageNet
25. PCS Primeco
26. PCIA
27. SNET
28. Southern
29. SBMS
30. Sprint Venture
31. TRA
32. U.S. AirWaves Inc. (U.S. AirWaves)
33. Vanguard
34. Waterway Communication System, Inc. (Watercom)

APPENDIX B

Final Regulatory Flexibility Analysis

As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Second Notice of Proposed Rulemaking in this proceeding (*Second NPRM*). The Commission sought written public comments on the proposals in the *Second NPRM*, including on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this Report and Order conforms to the RFA, as amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-21, 110 Stat. 847 (1996).

I. Need for and Purpose of this Action:

In this decision, the Commission, on an interim basis, extends its rule under which cellular licensees are currently prohibited from restricting resale of their service to broadband personal communications services (PCS) and certain geographic area specialized mobile radio (SMR) providers. The Commission also eliminates an exception to the current rule under which cellular licensees are permitted to restrict resale by competing fully operational cellular licensees in the same geographic market. The purposes of this action are to help bring the benefits of competition to the market for these services while the market is in transition to a fully competitive state, as well as to help jump start competition by allowing new entrants to enter the marketplace quickly by reselling their competitors' services while they build out their facilities.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:

No comments were filed in direct response to the IRFA. In general comments on the *Second NPRM*, however, some commenters raised issues that might affect small entities. In particular, some commenters argued that the obligation to permit unrestricted resale would make it difficult for some providers, especially paging, narrowband PCS, public coast service, and other small providers, to manage their capacity and to earn a reasonable return on their investment. The Commission determined that these objections were not well founded because the resale rule does not prevent carriers from pricing their services so as to earn a return on their investment or from including provisions in their contracts to protect themselves against stranded capacity.

III. Changes Made to the Proposed Rules:

In the *Second NPRM*, the Commission proposed to extend the resale rule to all commercial mobile radio services (CMRS) providers. However, the Commission here

determines instead to apply the rule only to cellular, broadband PCS and certain SMR providers because it has concluded that application of the resale rule to other CMRS providers will not promote the public interest at this time. The Commission also determines to sunset application of the resale rule to affected cellular, broadband PCS and SMR providers in approximately five years because by that time the development of competition is expected to render the rule unnecessary. In light of this sunset decision, the Commission does not adopt its proposal to allow providers subject to the rule to restrict resale by their fully operational facilities-based competitors, and it further eliminates the existing exception between competing cellular licensees in order to maintain regulatory parity and because it has determined that the exception no longer serves a useful purpose.

IV. Description and Estimate of the Small Entities Subject to the Rules:

The rule adopted in this Report and Order will apply to providers of cellular, broadband PCS, and geographic area 800 MHz and 900 MHz specialized mobile radio services, including licensees who have obtained extended implementation authorizations in the 800 MHz or 900 MHz SMR services, either by waiver or under Section 90.629 of the Commission's Rules. However, the rule will apply to SMR licensees only if they offer real-time, two-way voice service that is interconnected with the public switched network.

A. Estimates for Cellular Licensees

The Commission has not developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the Small Business Administration (SBA) rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing fewer than 1,500 persons.[81] Since the Regulatory Flexibility Act amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small cellular businesses and is unable at this time to determine the precise number of cellular firms which are small businesses.

The size data provided by the SBA does not enable us to make a meaningful esimate of the number of cellular providers which are small entities because it combines all radiotelephone companies with 500 or more employees.[82] We therefore used the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. This document shows that only 12

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[81] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

[82] U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce, SIC Code 4812 (radiotelephone communications industry data adopted by the SBA Office of Advocacy).

radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.[83] Therefore, even if all 12 of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. We assume, for purposes of our evaluations and conclusions in this FRFA, that all of the current cellular licensees are small entities, as that term is defined by the SBA. Although there are 1,758 cellular licenses, we do not know the number of cellular licensees, since a cellular licensee may own several licenses.

B. Estimates for Broadband PCS Licensees

The broadband PCS spectrum is divided into six frequency blocks designated A through F. Pursuant to 47 C.F.R. § 24.720(b), the Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than $40 million in the three previous calendar years. This regulation defining "small entity" in the context of broadband PCS auctions has been approved by the SBA.[84]

The Commission has auctioned broadband PCS licenses in Blocks A, B, and C. We do not have sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. There were 89 winning bidders that qualified as small entities in the Block C auction. Based on this information, we conclude that the number of broadband PCS licensees affected by the rule adopted in this Report and Order includes the 89 winning bidders that qualified as small entities in the Block C broadband PCS auction.

At present, no licenses have been awarded for Blocks D, E, and F of broadband PCS spectrum. Therefore, there are no small businesses currently providing these services. However, a total of 1,479 licenses will be awarded in the D, E, and F Block broadband PCS auctions, which are scheduled to begin on August 26, 1996. Eligibility for the 493 F Block licenses is limited to entrepreneurs with average gross revenues of less than $125 million. However, we cannot estimate how many of these licenses will be won by small entities, nor how many small entities will win D or E Block licenses. Given the facts that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective D, E, and F Block licensees can be made, we assume, for purposes of our evaluations and conclusions in this FRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

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[83] U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

[84] *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).